

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of: |) | |
| |) | |
| Amendment of the Commission's Rules |) | |
| Governing |) | MB Docket No. 10-71 |
| Retransmission Consent |) | |
| |) | |

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter") hereby replies to the Comments submitted in the above-captioned proceeding. Ironically, the Comments filed last month by various broadcast parties ("Broadcasters") confirm why meaningful Commission action is essential in this proceeding. While the Broadcasters' invariably oppose regulatory intervention, they admit that retransmission consent fees are increasing rapidly, and they boast that these fees are likely to increase even more dramatically in the future. In arguing against regulatory intervention, the Broadcasters denigrate the Commission's general regulatory authority, and they ignore the specific responsibility under Section 325(b)(3)(A) of the Communications Act to establish regulations that prevent retransmission consent from having a harmful impact on basic service rates.

Fortunately, the Comments filed by various multichannel video programming distributors ("MVPDs") identify a wide array of mechanisms through which the Commission can sensibly fulfill its regulatory responsibility. Charter urges the Commission to pay special attention to the negotiation framework proposed by Cablevision Systems Corporation. The rigorous **transparency** and **non-discrimination** conditions that Cablevision recommends could mitigate

at least some of the problems associated with the current retransmission consent process without requiring the Commission to directly intervene in individual negotiations.

I. THE BROADCASTERS CONCEDE THAT, UNLESS THE COMMISSION INTERCEDES, RETRANSMISSION FEES WILL CONTINUE TO ESCALATE.

The Broadcasters repeatedly emphasize in their Comments that retransmission consent fees are relatively low compared to the affiliation fees garnered by cable programmers.¹ They also acknowledge that increasing competition among MVPDs now allows broadcast stations to extract fees that were not attainable when retransmission consent was created as part of the 1992 Cable Act.² Indeed, the Broadcasters have officially put the Commission on notice that it should expect to see dramatic increases in retransmission consent fees for the foreseeable future.

¹ See, e.g., Comments of Allbritton Communications at 3 (“But even today, average subscriber fees paid by MVPDs in markets where our stations carry the top-rated programming remain a tiny fraction of the fees that MVPDs pay national cable networks.”); Joint Comments of Barrington Broadcasting Group, LLC, *et al*, at 10 (“Based on a review of ratings data from the November 2009 sweeps period, cable operators *paid more than 10 times the per-subscriber fee* for cable networks that were *less than half as popular* as the broadcast network channels.”); Comments of Nexstar Broadcasting, Inc. at 8 (“Broadcasters deserve to be fairly compensated for their programming investments as much as Discovery, TNT, TBS and every other non-broadcast programming channel does.”); Comments of Sinclair Broadcast Group, Inc. at 12 (“While broadcasters are collecting larger retransmission rights payments than they did in the past, those rights are substantially underpriced even at \$1 or more per month for a Big 4 station.”)

² See, e.g., Comments of Allbritton Communications Comments at 3-4 (“Satellite and telco distribution providing subscriber choices for program delivery eliminated the stranglehold that cable operators had on the negotiating process. The free market of valuing programming and distribution now, in fact, is starting to work.”); Belo Corp. Comments at 8-9 (“In addition to the continued expansion of DBS, the entrance of new competitors, such as AT&T U-verse and Verizon FiOS, provided new competition to the incumbent cable companies.... This marketplace competition has helped realize Congress’ goal of enabling broadcasters to recognize the value that they deliver to an MVPD’s channel line-up.”); Comments of CBS Corporation at 2 (“To be sure...there have been changes in the marketplace affecting retransmission consent negotiations. The emergence of meaningful competition to cable operators from satellite providers and telco entrants has pressed once-dominant MSOs to compensate broadcasters fairly, including with cash, for the signals they resell to their subscribers”); Joint Comments of Small and Mid-Sized Market Broadcasters at 3 (“The much-needed introduction of competition to the MVPD marketplace has merely enabled broadcasters, for the first time, to negotiate successfully for the right to *receive* cash consideration from MVPDs.”)

The Commission need not determine in this proceeding whether retransmission consent fees historically have been priced appropriately. The critical and uncontested fact here is that retransmission consent fees are increasing at a rapid pace, which necessarily impacts the basic service rates paid by MVPD consumers. The Broadcasters are dismissive of the rate ramifications of their escalating retransmission consent demands, but that is precisely the issue the Commission must address in this proceeding.

II. BY IGNORING THE PLAIN LANGUAGE IN SECTION 325(b)(3)(A), THE BROADCASTERS UNDERMINE THEIR ASSERTION THAT THE COMMISSION LACKS AUTHORITY TO REGULATE RETRANSMISSION CONSENT.

Having embraced a dramatic escalation in retransmission consent fees, the Broadcasters insist that the Commission is powerless to do anything about it. Their Comments repeatedly recite a handful of statements from the legislative history suggesting that the Commission should defer to the “marketplace.” But the Broadcasters’ legal analyses are fundamentally flawed, because they ignore the critical regulatory language set forth in Section 325(b)(3)(A) of the Communications Act. As Charter noted in its Comments, this statutory provision “expressly requires the Commission to consider the rate implications of retransmission consent and to prescribe regulations to ensure that retransmission consent fees do not lead to unreasonable increases in basic service rates.”³ The Broadcasters’ refusal to acknowledge this statutory provision in their Comments is a disservice to the Commission. Given the nature of this proceeding, an honest discussion of the Commission’s authority must consider this particular provision.

³ Charter Comments at 3.

The Commission may disagree with Charter as to exactly what action Section 325(b)(3)(A) requires in light of rapidly escalating retransmission consent fees. Charter respectfully submits, however, that this statutory provision compels *some* meaningful response.

III. THE COMMISSION SHOULD ADOPT THE RETRANSMISSION CONSENT REFORM PROPOSED BY CABLEVISION.

The Comments submitted by MVPDs advance a wide variety of options through which the Commission could mitigate the increasingly harmful consumer effects of retransmission consent. The constructive approach taken by MVPDs stands in sharp contrast to the Broadcasters, whose Comments contend that any restriction whatsoever on the exercise of retransmission consent would jeopardize the viability of broadcast television. If the Broadcasters are right, it is time for the Commission to seriously evaluate the future role of broadcast television. In this regard, the analysis presented by the American Television Alliance in Professor Hazlett’s “If a TV Station Broadcasts in the Forest: An Essay on 21st Century Video Distribution,” deserves serious attention. In any event, as Charter noted in its Comments, “To the extent broadcasters enjoy special regulatory protections [including the use of valuable public spectrum], logic dictates that they be subject to special regulatory restraints as well – including the rate restraint set forth in Section 325(b)(3)(A) of the Communications Act.”⁴

Although the Commission should seriously consider all of the MVPD reform proposals, Charter believes that Cablevision’s proposal to amend the “good faith” rules is particularly noteworthy. Cablevision’s proposal (as set forth in Section II of its Comments) is well-designed to “ameliorate the consumer harm that results from today’s outdated regulatory scheme.”⁵ It retains the broadcasters’ ability to negotiate a market-rate for retransmission consent, but

⁴ Charter Comments at 5, n. 7.

⁵ Cablevision Comments at 9.

imposes sensible negotiating conditions to minimize the likelihood of broadcasters exploiting MVPD competition in a manner that is unduly harmful to MVPD consumers. In its own words:

Cablevision's proposal is based on three interrelated principles: non-discriminatory pricing, transparency in pricing, and no tying. Implemented together, Cablevision's solution will reduce the disruption in broadcast programming consumers experience today, curb the higher prices that are flowing through to consumers as the cost of retransmission consent rises, and restore balance to the retransmission consent marketplace.⁶

Charter will not repeat here all the details of Cablevision's proposal, but it applauds the simple beneficial concepts – *i.e.*, non-discrimination, transparency, and no-tying – upon which the proposal is premised. Based on its own experience negotiating retransmission consent agreements, Charter believes that Cablevision's proposal could materially benefit MVPD consumers by improving the retransmission consent process. Cablevision's proposal is particularly impressive because of the fair and efficient manner in which it would restrain broadcaster abuses. Indeed, Cablevision's proposal promises meaningful relief without demanding direct Commission involvement in individual negotiations.

Charter recognizes that cable programmers generally are not subject to the negotiating conditions that Cablevision suggests be imposed on broadcasters exercising retransmission consent, but that does not mean that these straight-forward conditions are inappropriate. To the contrary, as noted above, both broadcasters and the Commission have a special responsibility regarding the retransmission consent process. Under the circumstances, those broadcasters opposed to Cablevision's reform proposal bear the burden of explaining why it would be unreasonable for the Commission to require non-discrimination, transparency, and no tying as necessary components to "good faith" retransmission consent negotiations. Charter submits that

⁶ *Id.*

these basic concepts, and the sensible manner in which Cablevision suggests they be applied, are the very least the Commission should do to reform retransmission consent.

CONCLUSION

The record in this proceeding amply demonstrates the need for Commission intervention in the retransmission consent process. Although the Commission has many credible regulatory options available to it, Charter suggests that Cablevision's reform proposal be adopted as an efficient and effective way to mitigate the most harmful consumer effects associated with the current process. Even if the Commission is disinclined to adopt Cablevision's reform proposal in totality, Charter submits that Cablevision's proposal merits further consideration as a useful model to achieve reasonable and necessary reform.

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